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Supreme Court of the United States

October Term, 1940.

No. 253.

EUGENE HIGGINS,

Petitioner,

vs.

GUY T. HELVERING, Commissioner of Internal Revenue,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

Reply Memorandum for the Petitioner to the Supplemental Memorandum on Behalf of the Respondent.

We received on January 15, 1941, in this case, a supplemental memorandum from the Solicitor General in regard to the Internal Revenue Bureau's reconciliation of the provisions of Section 23-A with those of Section 101-(C)(8) of the Revenue Act of 1932 (since then amended), and we see no reason to dissent from his conclusions in regard to that matter.

We noted, however, that the memorandum so served failed to contain any statement of the practice of the Comsioner, up until the hearing of the present case before the

Board of Tax Appeals, as to treating the management by a tax payer of his own securities as "carrying on business" where the activities of the taxpayer had the regularity, variety, extent and continuity of "carrying on business", as distinguished from mere isolated transactions.

We, therefore, wrote the Solicitor General on the 16th of January, 1941, admitting service of the said supplemental memorandum, and inquiring whether he contemplated filing any further supplemental memorandum, and on January 18th, 1941 received from him a note to the effect that he did not contemplate filing any further memorandum.

The contentions of the petitioner under Points II and IX of our main brief, as to the steady practice of the Internal Revenue Bureau on this point up to the hearing of this case before the Board of Tax Appeals, thus remain without tangible challenge, or citation of any case of different contention on the part of the Commissioner of Internal Revenue, despite the oral suggestion of counsel for the respondent on the argument that the practice had varied, and despite the request of Justice STONE for citation of any divergent rulings on the part of the Commissioner.

Evidently no divergent rulings that could possibly have come to the attention of the Congress could be found by counsel for the respondent, any more than by ourselves.

Respectfully submitted,

SELDEN BACON,
ORWILL V. W. HAWKINS,
Counsel for Petitioner.

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